

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION

FIRST APPEAL NO.2387 OF 2011

Smt. Khushbunnisa w/o. Mohamad Umar Khan ... Appellant

V/s.

Municipal Corporation for Greater Mumbai ...Respondent

Mr. Y. E. Mooman i/b. Ms. Manisha Gwade for the Appellant
Mrs. M. R. Bhoir for the Respondent.

CORAM: K.K. TATED, J.
DATED : FEBRUARY 26, 2015

PC. :

1. Heard the learned counsel for the parties. By consent of the parties and as per the earlier order passed by this court, the matter is taken up for final hearing at the stage of admission itself.

2. By this appeal, the Appellant Plaintiffs challenge the judgment and decree dated 26/09/2011 passed by the Bombay City Civil Court, Mumbai in L.C.Suit No.2416/2005 dismissing the Plaintiff's suit for an order of injunction restraining Respondent corporation from taking any action pursuant to the notice dated 24/03/2005 issued under section 351 of the Mumbai Municipal Corporation Act, 1888 (MMC Act) and order dated 24/05/2005 passed by the Assistant Commissioner, E Ward.

3. For the sake of convenience, the parties will be referred to as per their nomenclature in the plaint, i.e. Appellant as Plaintiff and Respondent as Defendant.

4. The Plaintiff is tenant in respect of the shop bearing No.2, Husaini Building, 2nd Peerkhan Street, Nagpada, Mumbai – 400 006 admeasuring about 300 sq.ft. together with loft as per the registered tenancy agreement dated 06/07/2003. The Defendant issued notice dated 24/03/2005 under section 351 of the Mumbai Municipal Corporation Act, 1888 (MMC Act) calling upon the Plaintiff to remove the unauthorised mezzanine floor with ladi coba and MS angle in shop No.2. To the said notice, the Plaintiff through her Advocate's letter dated 29/03/2005 gave reply relying on the rent bill of shop No.2 issued by the landlord showing loft in it, inspection extract of the property of the year 1984-85 and inspection extract dated 03/08/2002 in support of her contention that the loft is in existence for the last several years and same was assessed since 1961-62. Considering the said reply, the Assistant Commissioner, E Ward by his order dated 24/05/2005 held that the Plaintiff failed and neglected to prove the authorization of the said loft/mezzanine floor (hereinafter referred to as the suit structure).

5. The Assistant Commissioner, E Ward, by order dated 24/05/2005 called upon the Plaintiff to remove the suit structure within 15 days from the date of receipt of the letter, failing which the same shall be demolished by the Corporation entirely at the Plaintiff's risk, costs and consequences, without giving any further intimation. Hence the

Plaintiff filed L.C.Suit No.2416/2005 in the Bombay City Civil Court, Mumbai for declaration that the impugned notice dated 24/3/2005 under section 351 of the Mumbai Municipal Corporation Act, 1888 Act and the order dated 24/05/2005 passed by the Assistant Commissioner, E Ward, are illegal, bad in law, null and void and not binding on the Plaintiff.

6. The Defendant filed their written statement and denied the Plaintiff's case. On the basis of the pleadings, the Trial Court framed following issues:

1)	Does Plaintiffs prove that notice bearing No.B/IV/BF/351/1114/04-05 dated 24.03.2005 and order dated 24.5.2005 in respect of suit structure by the Defendant is illegal and void ?
2)	Is the suit bad for want of notice u/s. 527 of MMC Act?
3)	Does Defendant prove that Plaintiff converted wooden loft into ladi coba?
4)	Is the Plaintiffs entitled for relief of declaration claimed?
5)	Is the Plaintiffs entitled for relief of injunction claimed ?
6)	What order and costs ?

7. The Plaintiff filed her affidavit of evidence through Constituted Attorney. The Defendant cross-examined the Plaintiff at length.

8. Considering the evidence on record, the Trial Court held that the Plaintiff failed and neglected to prove the authorization of the suit structure and dismissed the Plaintiff's suit. Hence, the present appeal.

9. The learned counsel for the Plaintiff submits that the judgment and decree dated 26/09/2011 passed by the Trial Court in L.C.Suit

No.2416/2005 is against justice, equity and good conscience and same is liable to be set aside. He submits that the Trial Court failed to consider letter dated 13/07/1985 issued by the Assistant Engineer and Collector, E Ward regarding inspection extract of the suit property in the year 1984-85. He submits that it is specifically stated in the said letter that in suit shop No.2, loft was in existence when the Defendant corporation carried out inspection in the year 1984-85. It is also specifically stated in the said letter that the first assessment was prior to 1961-62.

10. The learned counsel for the Plaintiff submits that even the Trial Court failed to consider the letter dated 03/08/2002 issued by the Assistant Assessor and Collector, E Ward in respect of the inspection extract in respect of the suit structure. He submits that it is specifically stated in the said letter that shop No.2 has a loft.

11. The learned counsel for the Plaintiff submits that even the Trial Court failed to consider the registered tenancy agreement dated 06/07/2003 in which it is specifically stated that shop No.2 was having full loft.

12. The learned counsel for the Plaintiff submits that the Trial Court failed to consider that the notice issued by the corporation dated 24/03/2005 under section 351 of the MMC Act itself is bad in law because same does not contain any specific details about the unauthorized construction carried out by the Plaintiff. He submits that admittedly, as per the documents placed on record for the year 1984-

85, the shop No.2 has a loft. He submits that in the notice under section 351 of the MMC Act dated 24/03/2005 the Defendant corporation failed to give specific measurement about the loft and mezzanine floor if constructed by the Plaintiff.

13. The learned counsel for the Plaintiff submits that the Trial Court failed to appreciate that to prove the contents of notice under section 351 of the MMC Act dated 24/03/2005 no one entered into witness box on behalf of the Defendant corporation. Those documents were not proved by them and therefore, there is no question of relying on them at the time of passing the impugned judgment and decree.

14. The learned counsel for the Plaintiff relies on the definition of “loft” as appears in Regulation 2(58) and definition of “mezzanine floor” in Regulation 2(61) of the Development Control Regulations for Greater Mumbai 1991. He further submits that it is crystal clear from these two definitions that 'Loft' means an intermediate floor between two floors or a residual space in a pitched roof above normal level constructed for storage. He submits that the Development Control Regulations have not defined 'Loft' and/or mezzanine floor by measurement. He submits that the Development Control Regulations came in to force in 1991 whereas the suit structure is in existence since 1961-62. These facts are not considered by the Trial Court properly.

15. The learned counsel for the Plaintiff submits that initially 'Loft’ was constructed of wooden beams. The same was replaced by the Plaintiff. That replacement comes under the tenantable repairs and

these facts are not considered by the Trial Court at the time of passing the impugned judgment. Hence, the judgment and decree passed by the Trial Court require to be set aside and the LC.Suit No.2416/2005 be decreed in terms of prayer clauses (a) and (b).

16. On the other hand, the learned counsel for the Respondent vehemently opposed the First Appeal. She submits that the Plaintiff failed and neglected to prove any document to show that the suit structure was constructed by them, after taking permission from the corporation. She further submits that, on inspection, they found that the Plaintiff constructed a mezzanine floor. Hence, they issued notice under section 351 of the MMC Act. She submits that the “loft” and “mezzanine floor” are defined under Regulation 38(5) and 38(6) which read thus:

38 (5) Loft:—

(1) Location — Lofts may be provided over kitchens, habitable rooms, bathrooms, water closets and corridors within a tenement in residential buildings, in shops, and in industrial buildings;

(ii) Height:—The height of the loft shall not be more than 1.5 mtr. If it exceeds 1.5 m. shall be counted towards F.S.I.

(iii) The lfts in non-residential buildings shall be located at least 2 mts. away from the entrance.

38 (6) Mezzanine Floor:—

(i) Size:—The aggregate area of a mezzanine floor in any room shall not exceed 50 per cent of the built-up area of that room. The size of a mezzanine floor shall not be less than 9.5 sq.m. if it is used as a living room. The area of the mezzanine floor shall be counted towards F.S.I. Provided, however, that in existing authorised

buildings having no balance FSI area of the mezzanine floors constructed prior to 15th August 1997 without approval may be exempted for FSI with special permission of the Commissioner subject to the terms and conditions and payment of premium as may be specified by the Commissioner.

Note – *Lofts having head room more than 1.5 mt. above, it shall be treated as mezzanine floor.*

(ii) Height:—The minimum height/head-room above a mezzanine floor shall be 2.2 m. The head-room under a mezzanine floor shall not be less than 2.2 m.

(iii) Other Requirements:—A mezzanine floor may be permitted over a room or a compartment, if—

(a) it conforms to the standards of living rooms in regard to lighting and ventilation in case its size is 9.5 sq.m. or more;

(b) it is so constructed as not to interfere under any circumstances with the ventilation of the space over and under it;

(c) no part of it is put to use as a kitchen;

(d) it is not closed, so that it could be converted into an unventilated compartment;

(e) it is at least 1.8 m. away from the front wall of such room;

(f) access to the mezzanine floor is from within the respective room below only;

(g) where it is in an industrial building, a no objection certificate from the relevant authorities of the Industries Department is obtained for the additional floor area.

17. The learned counsel for the Defendant submits that bare reading of the definition of “loft” and “mezzanine floor” clearly show that the construction carried out by the Plaintiff is “mezzanine floor”. He further submits that the said construction is carried out without any permission. He submits that all documents on record are correctly considered by the Trial Court at the time of passing the impugned

decree. Hence, there is no substance in the appeal and same be dismissed with costs.

18. Heard both sides at length. I have gone through the copy of the plaint, written statement and other documents placed on record. After perusing the judgment and decree passed by the Trial Court and pleadings on record, following points arise for my consideration:

a)	Whether the notice issued by the Respondent corporation under section 351 of the MMC Act is according to law?	No
b)	Whether the order dated 24/05/2005 passed by the Corporation is tenable in law?	No

19. In the present proceedings, the Plaintiff is occupying the suit premises for the last several years as a tenant. The Plaintiff mainly relies on letter dated 13/07/1985 issued by the Municipal Corporation in which the first date of assessment and inspection extract in respect of the suit property is shown. The date of assessment is shown prior to 1961-62. In the said letter, it is specifically stated that Defendant carried out inspection for the year 1984-85 in which it is recorded that shop No.2 is with loft. In similar way, the learned counsel for the Plaintiff relied on letter dated 03/08/2002. The said letter shows that the suit property was in existence since the year 1962-63.

20. The impugned notice dated 24/03/2005 under section 351 of the MMC Act was issued by the Corporation after carrying out inspection of

the suit premises. In the said notice, it is nowhere stated which area of the loft/ mezzanine floor is unauthorized. In the said notice, it is stated that the entire suit structure/mezzanine floor is unauthorized. If we compare the notice under section 351 of the MMC Act dated 24/05/2005 with letters dated 3/07/2005 and 03/08/2002, it will be clear that the corporation has not stated in the notice about the existing loft in shop No.2. It is the duty of the corporation to issue a notice under section 351 of the MMC Act disclosing the existing structure and addition, if any, made by the owner and/or occupant, so that it would be easy to identify the unauthorized structure carried out. In the present proceedings though the letter dated 13/07/1985 and 03/08/2002 were placed before the Assistant Commissioner, E Ward without considering the same and/or verifying office record, held that the Plaintiff failed to prove the existence of the structure on the date of issuing notice under section 351 of the MMC Act. If notice itself is defective, the corporation has no right to take action.

21. On the above mentioned facts and the letters of the Corporation, it is crystal clear that the notice issued by the corporation which does not disclose the exact area of the unauthorized construction carried out by the Plaintiff is defective. Hence, I am of the opinion that the notice issued by the corporation under section 351 of the MMC Act dated 24/05/2005 itself is void. Hence, same is required to be set aside.

22. From the documents on record, particularly, the letters of Defendant corporation dated 13/07/1985 and 03/07/2002, it is crystal clear that the suit structure i.e. loft/mezzanine floor was in existence

for the last several years. Even the same was shown in tenancy agreement dated 06/07/2004. Considering these facts and the documents on record, I am of the opinion that the Trial Court erred in coming to the conclusion that the Plaintiff failed and neglected to produce any document to that effect. Both the issues are answered in negative. Hence, the following order:

- a) The First Appeal is allowed.
- b) The impugned judgment and decree dated 26/09/2011 passed by the Trial Court in L.C.Suit No.2416/2005 are set aside.
- c) Suit is decreed holding that notice dated 24/03/2015 under section 351 of the Mumbai Municipal Corporation Act, 1888 and order dated 24/05/2015 passed by the Assistant Commissioner, E- Ward, Mumbai is void in law and is set aside.
- d) Liberty granted to the Defendant corporation to issue fresh notice by giving particulars about the suit structure, if they so desire for the same cause of action.
- e) First Appeal stands disposed of accordingly.
- f) No order as to costs.

(K.K. TATED, J.)